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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

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KEVIN FRANCIS and REBECCA IVES,  
Individually, the Natural parents of S.I., :  
Deceased, TIM MULVEY and  
REBECCA IVES, Individually, and on :  
Behalf of their Minor Child, J.M.,

Plaintiffs, :

vs. :

UNITED STATES OF AMERICA, et al :

Defendant. :

2:08cv00244 SA

**DEFENDANT UNITED STATES'  
MEMORANDUM IN SUPPORT  
OF ITS MOTION TO DISMISS**

Hon. Samuel Alba

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Defendant United States of America ("United States") respectfully submits this memorandum in support of its Motion to Dismiss. As explained more fully below, Plaintiffs' claims of negligence against the United States must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) as they are barred by the discretionary function exception to the Federal Tort Claims Act.

## STATEMENT OF FACTS

### I. The Uinta National Forest.

1. The Uinta National Forest (“Forest”) encompasses a total of 983,670 acres, including 897,390 acres of National Forest System lands within the following five counties: Utah, Wasatch, Juab, Sanpete and Tooele. The Forest has three Ranger Districts: Heber, Pleasant Grove, and Spanish Fork.<sup>1</sup>

2. The Forest includes a variety of landscapes from high western desert, to high mountain peaks such as Mount Nebo (11,877 feet) and Mount Timpanogos (11,750 feet). The Forest contains wilderness areas totaling approximately 58,400 acres. The Forest is a major supplier of recreational opportunities in Utah due to its close proximity to a major urban center; it ranks sixth of all National Forests in recreational use and demand. Id.

3. The Forest provides access to over thirty developed campgrounds, which include services such as fire pits, toilets and picnic tables.<sup>2</sup> The Forest also provides developed picnic areas, which do not allow overnight camping. Id.

4. One of the developed campgrounds in the Forest is the Timpooneke Campground. See Declaration of John R. Logan (“Logan Decl.”) at ¶ 6, attached hereto as Exhibit 1. It is located in a mountainous area next to the Mt. Timpanogos Wilderness Area in American Fork

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<sup>1</sup> Executive summary for the Forest Plan EIS, available at: [http://www.fs.fed.us/r4/uinta/projects/planning/docs/2003/feis/acrobat/feis\\_execsum/feis\\_execsum.pdf](http://www.fs.fed.us/r4/uinta/projects/planning/docs/2003/feis/acrobat/feis_execsum/feis_execsum.pdf)

<sup>2</sup> General information on campgrounds available at: <http://www.fs.fed.us/r4/uinta/recreation/camping/> Listings of individual campgrounds and facilities provided can be found by following links to campground listings for each Ranger District.

Canyon. Id. It provides many services, including the following: fire rings, grills, picnic tables, restrooms and water. Declaration of John Sheely (“Sheely Decl.”) at ¶ 2, attached hereto as Exhibit 2. The fee for a single campsite in 2007 was \$13.00. Id.

5. Dispersed camping is also allowed in the Forest. Dispersed camping is the term used for camping anywhere in the Forest that is outside of a developed campground. See Uinta National Forest Dispersed Camping Recreational Activities at 1, attached hereto as Exhibit 3. Dispersed campsites have no toilets, no treated water, and no fire pits or fire grates. Id. There is no fee involved with camping in a dispersed site. Id. Extra responsibilities and skills are necessary for dispersed camping. Id. Such areas exist because many people enjoy the solitude and primitive experience of camping away from developed campgrounds and other campers. Id.

6. Signs warning that Utah is bear country are located throughout the Forest. See Logan Decl. at ¶ 3. One such sign was located on the bulletin board at the Tank Canyon pull-out on the road up American Fork Canyon towards the Timpooneke Campground. Id. at ¶ 4. The sign provides guidelines concerning bears that people should follow while in the Forest. Id. Another warning sign was located at the entrance to the Timpooneke Campground. Id. at ¶ 6. Additional warnings about bears are contained on the Forest website.<sup>3</sup>

## **II. The Events of June 17, 2007.<sup>4</sup>**

7. On June 17, 2007, the Utah County Sheriff’s Office Dispatch received a call from Jake Francom, who reported that he had encountered a bear earlier that morning while camping

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<sup>3</sup> See <http://www.fs.fed.us/r4/uinta/recreation/index.shtml>.

<sup>4</sup> These facts are provided only for the purpose of background and context for the Court. None of the facts are material to the legal question of whether the Court has subject matter jurisdiction over Plaintiffs’ claims.

in a dispersed campsite in an area above Mutual Dell in American Fork Canyon. Transcript of June 17, 2007 telephone call from Jake Francom to Utah County Dispatch, attached hereto as Exhibit 4. Mr. Francom reported that the bear hit his head through the tent, ripped the tent, and had damaged his cooler. Id. at 1-2. He and his friends were able to scare the bear away and no one was injured. Id.

8. Pursuant to the Memorandum of Understanding between the USDA Forest Service, Intermountain Region and the State of Utah, Utah Division of Wildlife Resources, the Utah Department of Wildlife Resources (“Utah DWR”) made the decision that same day to classify the bear reported by Mr. Francom as a Level III nuisance bear. See Memorandum of Understanding, attached hereto as Exhibit 5. Pursuant to State policy regarding the handling of black bears, the Utah DWR then proceeded to search for the bear in order to destroy it. See State of Utah DWR, No. W5WLD-3, Handling Black Bear Incidents, attached hereto as Exhibit 6.

9. At approximately 6:00 p.m. on June 17, 2007, the Plaintiffs arrived at the Timpooneke Campground intending to camp there. See Sheely Decl. at ¶ 3. The Plaintiffs, however, could not pay the \$13.00 fee charged for camping at the Timpooneke Campground. Id. The Plaintiffs then left the Timpooneke Campground in search of a primitive campsite above the Timpooneke Campground for which there was no fee. Id.

10. At approximately 11:00 p.m., Plaintiff Tim Mulvey contacted Mr. Sheely, the campground manager at the Timpooneke Campground, and reported that someone had cut open their tent and taken his stepson, S.I.<sup>5</sup> Id. at ¶ 4. Mr. Sheely immediately drove to the

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<sup>5</sup> Pursuant to DUCivR 7-3(a)(2), all minor children are referred to only by their initials.

Timpanogos Cave National Monument to call the Utah County Dispatch to report the incident.

Id. at ¶ 5.

11. Utah County Deputies responded to the call and Mr. Sheely assisted them in locating the family's campsite. Id. at ¶ 6. Plaintiffs' campsite was located on a dirt road approximately one and one-half miles above the Timpooneke Campground in a dispersed campsite. Id.

12. S.I. was found deceased and it was apparent that his injuries were consistent with a bear attack. Complaint at ¶ 23.

13. The bear believed to be responsible for the death of S.I. was tracked and killed on June 18, 2007. Id. at ¶ 24.

### **III. Plaintiffs' District Court Complaint.**

14. On March 28, 2008, Plaintiffs filed this Federal Tort Claims Act ("FTCA") case against the United States. Id.

15. Plaintiffs claim that the United States was negligent because: (1) "USDA Forest Service agents left the campground without placing any notices about the Level III nuisance bear, or attempting to notify potential users of the campground of the imminent danger presented by the Level III bear;" (2) "USDA Forest Service Agents failed to close the campground and thereby remove any attractants until the bear could be destroyed;" and (3) "USDA Forest Service agents failed to remove any attractants, or assure that campers with food (attractants) were kept from coming into the campground." Id. at ¶ 26.

**IV. Relevant Statutes, Regulations and Policies of the Forest Service.**

16. Federal statute establishes that the “national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.”

16 U.S.C. § 528. The Secretary of Agriculture is “directed to develop and administer the renewable surface forests for multiple use.” 16 U.S.C. § 529.

17. Forest Service regulations establish that the “overall goal of managing the N[ational] F[orest] S[ystem] is to sustain the multiple uses of its renewable resources in perpetuity while maintaining the long-term productivity of the land. Resources are to be managed so they are utilized in the combination that will best meet the needs of the American people.” 36 C.F.R. § 219.1(b).

18. Forest Service regulations further provide that in the context of wildlife management, the Forest Service “may enter into such general or specific cooperative agreements with appropriate State officials” to secure and maintain “desirable populations of wildlife species.” 36 C.F.R. § 241.2.

19. Title 2300 of the Forest Service Manual (“FSM”) sets forth the guidelines for “Recreation, Wilderness, and Related Resource Management.” See FSM 2300, Chapter 2300–Zero Code, attached hereto as Exhibit 7. Section 2302 of the FSM identifies the “OBJECTIVES” to be achieved by managing recreation and wilderness as:

1. To provide nonurbanized outdoor recreation opportunities in natural appearing forest and rangeland settings.
2. To protect the long-term public interest by maintaining and enhancing open space options, public accessibility, and cultural, wilderness, visual, and natural resource values.

3. To promote public transportation and/or access to National Forest recreation opportunities.
4. To shift land ownership patterns as necessary to place urbanized recreation settings into other ownerships to create more public open space and/or natural resource recreation values.
5. To provide recreation opportunities and activities that:
  - a. Encourage the study and enjoyment of nature;
  - b. Highlight the importance of conservation;
  - c. Provide scenic and visual enjoyment; and
  - d. Instill appreciation of the nation's history, cultural resources, and traditional values.

Id. at 4.

20. Section 2330 of the FSM governs "Publicly Managed Recreation Opportunities." See FSM 2300, Chapter 2330, attached hereto as Exhibit 8. Section 2330.2 of the FSM identifies the Objective of developing and managing Forest Service recreation sites and facilities as follows:

1. To maximize opportunities for visitors to know and experience nature while engaging in outdoor recreation.
2. To develop and manage sites consistent with the available natural resources to provide a safe, healthful, esthetic, non-urban atmosphere.
3. To provide a maximum contrast with urbanization at National Forest System sites.

Id. at 1.

21. Section 2332, which governs Public Safety at developed recreation sites, provides:

To the extent practicable, eliminate safety hazards from **developed** recreation sites. Inspect each public recreation site annually before the beginning of the managed-use season. Maintain a record of the inspections and corrective actions taken with a copy of the operation and maintenance plan.

Immediately correct high-priority hazards that develop or are identified during the operating season or close the site.

See FSM 2300, Chapter 2330, Section 2332.1, attached hereto as Exhibit 9 (emphasis added).

22. FSM 2300, Chapter 2330 identifies only two types of hazards: tree hazards (2332.11) and other natural hazards (2332.12). Id.

23. With regard to other natural hazards at developed recreation sites, the FSM provides the following:

If practicable, correct known natural hazards when a site is developed and open for public use. If the hazards remain or new natural hazards are identified, take steps to protect the public from the hazards. Tailor the action taken to each hazardous situation. Consider posting signs, installing barriers, or, if necessary, closing the site to address concerns of public safety.

Id. (2332.12).

### **STANDARD OF REVIEW**

Plaintiffs' claims against the United States (Count I) should be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) because the United States has not waived its sovereign immunity for damages resulting from certain policy-based, discretionary actions of its officers and employees. Whether the United States has waived sovereign immunity for a particular type of suit is properly posed as a question of subject matter jurisdiction. See Estate of Trentadue ex rel. Aguilar v. United States, 397 F.3d 840, 853-54 (10th Cir. 2005).

Challenges under Federal Rule of Civil Procedure 12(b)(1) take one of two forms: (1) facial attacks on the sufficiency of jurisdictional averments; or (2) factual attacks on the accuracy of jurisdictional allegations. Holt v. United States, 46 F.3d 1000, 1002-03 (10th Cir. 1995). Where, as here, the challenge is a factual attack, the court must look beyond the allegations in the

complaint and has wide discretion to allow documentary and testimonial evidence under Rule 12(b)(1). See Paper, Allied-Industrial, Chemical & Energy Workers Intern'l Union v. Continental Carbon Co., 428 F.3d 1285, 1292 (10th Cir. 2005).

## ARGUMENT

### **I. PLAINTIFFS' CLAIMS AGAINST THE UNITED STATES MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THEY ARE BARRED BY THE DISCRETIONARY FUNCTION EXCEPTION TO THE FTCA.**

It is well settled that the United States, as a sovereign entity, "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain that suit." Lehman v. Nakshian, 453 U.S. 156, 160 (1981) (quoting United States v. Testan, 424 U.S. 392, 399 (1976)). Thus, suit against the United States can only be entertained when Congress has specifically waived the United States' immunity. See id. Furthermore, such waiver of sovereign immunity cannot be implied; it must be unequivocally expressed. See Franconia Assocs. v. United States, 536 U.S. 129, 141 (2002).

The FTCA is a limited waiver of the United States' sovereign immunity. The FTCA's waiver of immunity is limited to causes of action against the United States arising out of certain torts committed by federal employees acting within the scope of their employment. See United States v. Orleans, 425 U.S. 807, 813 (1976). Because the FTCA is only a limited waiver of the United States' sovereign immunity, it is subject to a number of exceptions. See, e.g., 28 U.S.C. §§ 1346(b) and 2680; Orleans, 425 U.S. at 813. These exceptions are to be "strictly observed and exceptions thereto are not to be implied." Lehman, 453 U.S. at 160 (quoting Soriano v. United States, 352 U.S. 270, 276 (1957)).

One of the exceptions to the jurisdiction granted by the FTCA is the discretionary function exception, 28 U.S.C. § 2680(a). See United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 809 (1984). The burden is on Plaintiffs to prove that their claims are not based upon actions immunized from liability under the discretionary function exception. See Elder v. United States, 312 F.3d 1172, 1176 (10th Cir. 2002).

The discretionary function exception precludes the imposition of liability against the United States for conduct “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. § 2680(a). The exception applies regardless of whether the government agent was negligent in his duties, so long as his duties were discretionary. See Dalehite v. United States, 346 U.S. 15, 32 (1953); Lopez v. United States, 376 F.3d 1055, 1057 (10th Cir. 2004). The exception “marks the boundary between Congress’ willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.” Berkovitz v. United States, 486 U.S. 531, 536 (1988) (quoting Varig Airlines, 467 U.S. at 808).

Analysis of the discretionary function exception is a threshold jurisdictional issue and “it is irrelevant whether the government employees were negligent.” Elder, 312 F.3d at 1176. Because the waiver of sovereign immunity is jurisdictional, the court lacks subject matter jurisdiction over a claim that falls within the discretionary function exception. Aragon v. United States, 146 F.3d 819, 823 (10th Cir. 1998).

Courts employ a two-part test to determine the applicability of the discretionary function exception. See United States v. Gaubert, 499 U.S. 315, 322-23 (1991); Berkovitz, 486 U.S. at

536-37; Elder, 312 F.3d at 1176. First, a court must determine whether the challenged conduct at issue involved a matter of judgment or choice. See Berkovitz, 486 U.S. at 536. The discretionary function exception does not apply if a “federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow” and “the employee has no rightful option but to adhere to the directive.” Gaubert, 499 U.S. at 322. The standards set forth by federal statute, regulation, or policy will bar the application of the discretionary function exception only if such standards are “both specific and mandatory.” Aragon, 146 F.3d at 823. It is the nature of the conduct that is at issue, not whether the conduct may have been negligent. Gaubert, 499 U.S. at 321.

Second, if the challenged conduct involves an element of judgment, a court must next “determine whether that judgment is of the kind that the discretionary function exception was designed to shield.” Berkovitz, 486 U.S. at 536. The discretionary function exception “protects only governmental actions and decisions based on considerations of policy.” Id. Congress specifically enacted the discretionary function exception “to prevent judicial “second-guessing” of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.” Id. at 537 (quoting Varig Airlines, 467 U.S. at 814).

“When established governmental policy, as expressed or implied by statute, regulation or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent’s acts are grounded in policy when exercising that discretion.” Gaubert, 499 U.S. at 324. To avoid dismissal, plaintiffs “must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.” Id. at 324-25. “The focus of the inquiry is not on the agent’s subjective

intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.” Id. at 325.

As set forth below, the actions at issue in this case were discretionary under the two prongs of the Berkovitz test. Therefore, the Court lacks subject matter jurisdiction and Plaintiffs’ claims must be dismissed.

**A. Under the Applicable Forest Service Provisions, Decisions Relating to Warning of Hazards and Campground Management are Discretionary.**

To prevail on the first prong, Plaintiffs must demonstrate that the challenged decisions involved “no ‘element of judgment or choice.’” Elder, 312 F.3d at 1176-77 (quoting Kiehn v. United States, 984 F.2d 1100, 1102 (10th Cir. 1993)). To do so, they must show that Forest Service “employees violated a federal statute, regulation, or policy that is both ‘specific and mandatory.’” Id. at 1177 (quoting Aragon, 146 F.3d at 823). This they cannot do.

Initially, Plaintiffs have failed to even identify any “federal statute, regulation, or policy.” Rather, they have merely alleged that the United States was negligent because (1) “USDA Forest Service agents left the campground without placing any notices about the Level III nuisance bear, or attempting to notify potential users of the campground of the imminent danger presented by the Level II bear;” (2) “USDA Forest Service Agents failed to close the campground and thereby remove any attractants until the bear could be destroyed;” and (3) “USDA Forest Service agents failed to remove any attractants, or assure that campers with food (attractants) were kept from coming into the campground.” Complaint at ¶ 26. Plaintiffs, therefore, have failed to meet their burden under Berkovitz.

Second, Plaintiffs cannot meet their burden because there simply is no statute, regulation or agency policy mandating the precise manner in which the United States should warn of hazards or manage a developed campground, let alone a dispersed campsite in a primitive area. There is nothing that “specifically prescribe[s] a course of action for an employee to follow” with respect to either warning of hazards or campground management. Elder, 312 F.3d at 1178.

### **1. Warnings.**

Plaintiffs initially claim that the United States failed to place notices or otherwise notify “potential users” about the Level III bear. Complaint at ¶ 26. Plaintiffs, however, have failed to cite a “specific and mandatory” statute, regulation, or Forest Service policy that required the Forest Service to identify all possible hazards, including those designated by the Utah DWR, and to post any particular sign or issue any particular warning within a particular time frame.

Indeed, no statute, regulation or agency provision required the Forest Service to post any signs or issue any warnings about a bear. To the contrary, the relevant provisions of the FSM, which apply only to developed recreation sites and not to dispersed campsites, allow the Forest Service wide discretion in identifying what is a hazard and determining how to respond to any such hazards, including whether or not to post any signs or issue any warnings. Section 2332.12 of the FSM provides that:

If practicable, correct known natural hazards when a site is developed and open for public use. If the hazards remain or new natural hazards are identified, take steps to protect the public from the hazards. Tailor the action taken to each hazardous situation. Consider posting signs . . . .

See Statement of Facts (“SOF”) at ¶ 23. Determining what is practicable requires the exercise of discretion. Rosebush v. United States, 119 F.3d 438, 442 (6th Cir. 1997) (finding that FSM §

2332 vested the Forest Service with “complete discretion” in managing its campgrounds, including determining what constitutes a hazard and whether warnings should be issued).

In the absence of a mandated course of action for Forest Service employees to follow, the challenged conduct was discretionary under the first prong of the Berkovitz test. See, e.g., Kiehn v. United States, 984 F.2d 1100, 1103 (10th Cir. 1993) (finding that, in absence of policy or statutory directive requiring the NPS to place signs warning of dangers of scaling sandstone cliffs, conduct was discretionary under the first prong of Berkovitz); Blankenburg v. United States, 134 Fed. Appx. 130, 131 (9th Cir. May 25, 2005) (“Here, the relevant decision was discretionary, because there was no statute, regulation, or policy prescribing where the Forest Service placed signs.”); Elder, 312 F.3d at 1180 (finding failure to warn of specific danger discretionary, where applicable procedures delegated “extensive discretion” to park managers, including determination of whether hazard existed, its severity, and “whether physical barriers or signs are appropriate safety measures”); Childers v. United States, 40 F.3d 973, 974 (9th Cir. 1995) (finding that decision by National Park Service not to close or sign winter trails satisfied the first prong of the Berkovitz test, where the relevant provisions required “significant discretion and judgment”).

Moreover, there were already several signs in the Forest that warned of bears, including one at the entrance to the Timpooneke Campground. SOF ¶ 6. To the extent that Plaintiffs are challenging the Forest Service’s decision concerning the precise type or manner of warnings provided, such decision was discretionary under the relevant provisions. See Elder, 312 F.3d at 1180; Childers, 40 F.3d at 976; Kiehn, 984 F.2d at 1103.

## 2. Campground Management.

Plaintiffs next claim that the United States was negligent because it “failed to close the campground and thereby remove any attractants until the bear could be destroyed” and “failed to remove any attractants, or assure that campers with food (attractants) were kept from coming into the campground.” Complaint at ¶ 26. Plaintiffs have again failed to cite to any “specific and mandatory” statute, regulation or Forest Service policy which required the Forest Service to close or restrict access to a dispersed campsite when the Utah DWR has classified a Level III bear. Even assuming *arguendo* that Plaintiffs had camped in the Timponeke Campground and not in a dispersed campsite, there is no statute, regulation or Forest Service policy that required the Forest Service to close or restrict access to the Timponeke Campground in response to the Utah DWR’s decision to classify a Level III bear.

To the contrary, the relevant provisions of the FSM vest the Forest Service with extensive discretion in the management of developed campgrounds. First, FSM § 2332.1 (Public Safety) is inherently discretionary. It states:

To the extent practicable, eliminate safety hazards from developed recreation sites. Inspect each public recreation site annually before the beginning of the managed-use season. Maintain a record of the inspections and corrective actions taken with a copy of the operation and maintenance plan.

Immediately correct high-priority hazards that develop or are identified during the operating season or close the site.

SOF ¶21 . As the Sixth Circuit has explained, Section 2332.1 of the FSM instructs the Forest Service to eliminate safety hazards from developed recreation sites only to the extent practicable and it does not mandate what the Forest Service should consider to be a hazard or a high-priority hazard. Rosebush, 119 F.3d at 442. “Decisions concerning what constitutes ‘practicable’ require

the exercise of discretion which is protected by [the] FTCA.” Id. (citing Varig Airlines, 467 U.S. at 797).

The Sixth Circuit further held that “this discretion is not lessened by Forest Service knowledge of earlier accidents involving [the same hazard] . . . . It is the governing administrative policy, not the Forest Service’s knowledge of danger [] that determines whether certain conduct is mandatory for purposes of the discretionary function exception.” Id. (citing Autery v United States, 992 F.3d 1523, 1528 (11th Cir. 1993)).

Second, FSM § 2332.12 (Other Natural Hazards) is also inherently discretionary. It states:

If practicable, correct known natural hazards when a site is developed and open for public use. If the hazards remain or new natural hazards are identified, take steps to protect the public from the hazards. Tailor the action taken to each hazardous situation. Consider posting signs, installing barriers, or, if necessary, closing the site to address concerns of public safety.

SOF ¶ 23. Again, this provision of the FSM vests the Forest Service with the discretion to determine what is “practicable” in addressing other natural hazards. Rosebush, 119 F.3d at 442. Furthermore, this provision directs the Forest Service to “tailor” any action taken based on the particular situation and only to “consider” closing a site “if necessary.” SOF ¶ 23. Such “directives vest complete discretion in the Forest Service as to the . . . management of the . . . Campground.” Rosebush, 119 F.3d at 442.

Accordingly, because the relevant FSM provisions did not mandate that the Forest Service manage its campground in any mandatory or specific manner, such decisions meet the first prong of the discretionary function test under Berkovitz. See Childers, 40 F.3d at 976 (finding that decision by NPS not to close or sign winter trails satisfied the first prong of the

Berkovitz test, where the relevant provisions required “significant discretion and judgment”); Rosebush, 119 F.3d at 442 (finding that decisions of the Forest Service regarding management of the campground were within the discretionary function exception of the FTCA where the “statutes, regulations and administrative policies did not mandate that the Forest Service” act in “any specific manner”); Kiehn, 984 F.2d at 1103 (finding decision not to place warning sign met first prong of Berkovitz test where “nothing directed NPS’s decision concerning the type or manner of warnings to provide”); Merando v. United States, 517 F.3d 160, 168-72 (3d Cir. 2008) (finding the discretionary function exception barred the plaintiff’s claim that the National Park Service negligently failed to find and remove a dead tree where “the controlling statutes, regulations, and policies . . . did not mandate any particular methods of hazardous tree management”); Autery v. United States, 992 F.2d 1523, 1529 (11th Cir. 1993) (finding NPS hazardous tree inspection plan, in effect at the time of the alleged accident, “did not compel park employees to inspect certain trees on certain days or remove a particular number of trees per week” and that, additionally, there was no evidence that the NPS failed to comply with its procedure).

**B. The Challenged Decisions Involved a Balancing of Public Policy Considerations.**

To prevail on the second prong and avoid dismissal, Plaintiffs “must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.” Gaubert, 499 U.S. at 324-25. Because Plaintiffs have failed to do so, their claims are barred by the discretionary function exception.

# 1. Warnings.

The conduct challenged by Plaintiffs – the failure to post warning signs or issue warnings – meets the second prong of the discretionary function test because it was based on considerations of policy. As set forth above, government policy, as expressed by the Forest Service Manual, permits the Forest Service to exercise discretion in determining whether to warn of potential danger. Supra at 13-14. Therefore, “it must be presumed that the agent’s acts are grounded in policy when exercising that discretion.” Gaubert, 499 U.S. at 324. Plaintiffs cannot overcome this presumption.

The decision whether to warn of potential danger is “susceptible to policy analysis.” Id. at 325. Such decision clearly involves social, economic and political policy issues of the type that Congress intended to protect, including balancing the needs of campground users, the needs of Forest visitors, aesthetic considerations, the effectiveness of various types of warnings and practical concerns such as staffing and funding.<sup>6</sup> See SOF ¶¶ 16-20, 23; Rosebush, 119 F.3d at 444 (decision whether to warn of danger “involves balancing the needs of the campground users, the effectiveness of various types of warnings, aesthetic concerns, financial considerations, and the impact on the environment, as well as other considerations”).

Numerous courts, including the Tenth Circuit and this Court, have found similar warning decisions to fall within the discretionary function exception. See Gadd v. United States, 971 F.Supp. 502, 509 (D. Utah 1997) (finding decision not to warn of black bears involved

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<sup>6</sup> “It is unnecessary for government employees to make an actual conscious decision regarding policy factors [and] . . . it [is] irrelevant whether the alleged failure to warn was a matter of deliberate choice, or a mere oversight.” Kiehn, 984 F.2d at 1105 (internal quotations and citation omitted).

“balancing of considerations of resource management and safety along with how best to handle safety concerns when absolute safety is not possible.”); Elder, 312 F.3d at 1181-84 (finding decision not to provide additional warnings required NPS to balance safety, access, cost, preservation of natural resources and aesthetic values, and the likely benefit of additional signage); Kiehn, 984 F.2d at 1105 (“The decision not to post warning signs in remote areas of a national monument inherently requires a balancing of public policy objectives, such as resource allocation, visitor safety and scenic preservation.”); Blankenburg, 134 Fed. Appx. at 131 (“[T]he Forest Service is charged with weighing resource program needs, environmental and resource protection requirements, aesthetics, recreational goals, and budgetary concerns in addition to safety when making road maintenance or sign placement decisions.”); Valdez v. United States, 56 F.3d 1177, 1180 (9th Cir. 1995) (finding that NPS decision not to warn of every danger presented by waterfall required balance of policy objectives, including limited resources, public access, public safety, concern about overproliferation of signs, and obviousness of risk); Bowman v. United States, 820 F.2d 1393, 1395 (4th Cir. 1987) (finding that NPS decision not to erect warning signs on parkway required balancing many factors, including safety, aesthetics, environmental impact, available financial resources, and the obviousness of the risk).

Accordingly, because the decision whether and how to warn of potential danger involves the balancing of many public policy objectives, it is a protected discretionary function under the second prong of the Berkovitz test. Rosebush, 119 F.3d at 443 (holding that “the decision of whether to warn of potential danger is a protected discretionary function”)

## 2. Campground Management.

Similarly, government policy, as expressed by the Forest Service Manual, permits the Forest Service to exercise wide discretion in managing developed recreation sites. Supra at 15-17. Under Gaubert, “it must [then] be presumed that the agent’s acts are grounded in policy when exercising that discretion.” 499 U.S. at 324. As with their first claim, Plaintiffs cannot overcome this presumption.

The challenged conduct – the decision whether to close or restrict access to a developed campground – is “susceptible to policy analysis” as it involves social, economic and political policy issues of the type that Congress intended to protect. Id. at 325. Decisions concerning the management of a developed campground, including the decision to close or restrict access to the campground, involve the balancing of numerous considerations. These include the provision of outdoor recreational opportunities, user accessibility, the needs of campground users, the needs of Forest users, safety concerns and practical concerns such as staffing and funding. See SOF ¶¶ 16-23; Rosebush, 119 F.3d at 443 (“decisions whether and how to make federal lands safe for visitors require making policy judgments”).

Several courts, including this Court, have found similar campground management decisions to fall within the discretionary function exception. See Gadd, 971 F.Supp. at 509 (finding decisions regarding “operation, management, control and supervision of the [] Campground are grounded in diverse public policies and involve balancing of considerations of resource management and safety along with how best to handle safety concerns when absolute safety is not possible.”); Rosebush, 119 F.3d at 444 (finding that decisions regarding campground management “involve[] balancing the needs of the campground users, the effectiveness of

various types of warnings, aesthetic concerns, financial considerations, and the impact on the environment, as well as other considerations”); Childers, 40 F.3d at 976 (finding that decision not to close winter trails was based on policy concerns, including balancing of preservation, public access, and visitor safety).

Accordingly, because the decision of how to manage a developed campground involves the balancing of many public policy objectives, it is a protected discretionary function under the second prong of the Berkovitz test. Rosebush, 119 F.3d at 443 (holding that both the “decision whether and how to make federal lands safe for visitors” and “the proper response to hazards are protected from tort liability by the discretionary function exception”).

In sum, because the Forest Service’s decisions relating to warnings and the management of developed campgrounds were discretionary and involved balancing a variety of public policy considerations, they are protected by the discretionary function exception. Therefore, Plaintiffs’ claims must be dismissed for lack of subject matter jurisdiction.

### **CONCLUSION**

For the foregoing reasons, the United States of America respectfully requests that the Court grant its Motion to Dismiss and dismiss Plaintiffs’ claims for lack of subject matter jurisdiction.

DATED this 30th day of June, 2008.

Respectfully submitted,  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office, and that a copy of the foregoing United States' Memorandum in Support of Its Motion to Dismiss was sent via electronic mail to all parties named below, this 30th day of June, 2008:

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